Supreme Court, U.S.
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No. 88-644

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1988

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CALCO, LTD. AND WILLIAM J. GARTNER,

Petitioners,

vs.

WATER TECHNOLOGIES CORPORATION, WATER POLLUTION CONTROL SYSTEMS, INC. & KANSAS STATE UNIVERSITY RESEARCH FOUNDATION,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION - AND APPENDIX -

Michael R. Dinnin
(Counsel of Record)
Robert A. Dunn
HARNESS, DICKEY & PIERCE
1500 N. Woodward Ave.
Birmingham, Michigan 48011
(313) 642-7000
Attorneys for Respondents

QUESTION PRESENTED

Has there been any violation of Federal Civil Procedure Rule 8 (e) (2), which expressly permits alternative and inconsistent pleadings; particularly when recognizing that the pleadings in question were made early in the proceedings involving third party cross-claims and before any deposition discovery had been taken to determine the course of the issues in the case, involving the validity of U.S. patents.

RULE 28.1 STATEMENT

The answer to the required listing is that Water Technologies Corporation ("WTC") is the parent of Water Pollution Control Systems, Inc. ("WPCS"); other than that the answer is "none".

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 28.1 STATEMENT	i
INDEX TO AUTHORITIES	iii
STATEMENT OF CASE	1
REASONS FOR DENYING THE WRIT	2
A. There is no important question involved	2
B. Petitioners' assertions that the patents-in-suit are invalid or unenforceable due to WPCS's use of alternative pleadings under Rule 8 (e) (2) are factually and legally unsupportable .	3
RELIEF REQUESTED	18
APPENDIX (COPY OF COUNT VII)	19

INDEX TO AUTHORITIES

	Page(s)
Cases:	
Continental Insurance Company v. Sherman v. Coates & Dorsey, 439 F.2d 1294 (5th Cir. 1971) ..	12, 13, 14
Douglas Equipment, Inc. v. Mack Trucks et al, 471 F.2d 222 (7th Cir. 1972) ...	14, 15
Fisher v. Gillette Co., 505 F.Supp. 184 (N.D. Ill. 1981)	6, 7
Freed v. Erie Lackawanna Railway Co., 445 F. 2d 619 (6th Cir. 1971) cert. denied, 404 U.S. 1017 (1972)	10
Lear, Inc. v. Adkins, 395 U.S. 653 (1969)	2
Other:	
Fed. R. Civ. P. 8(e)(2)	passim
Fed. R. Civ. P. 11	4

STATEMENT OF CASE

This is a patent infringement case involving four patents which describe unique bactericidal resins for purifying water. The two basic patent inventions were made by Professor Jack L. Lambert and Professor Louis R. Fina at the Kansas State University laboratories. The two improvement patents were developed by Dr. Gary L. Hatch (at Aqua-Chem Co. in Milwaukee), who had formerly been a graduate student working with Professors Lambert and Fina at KSU. Both the Chicago trial court and the Court of Appeals for the Federal Circuit found that the defendant-Petitioners Calco and Gartner had willfully infringed all four of the patents, and that the patents were valid and fully enforceable.

REASONS FOR DENYING THE WRIT

A. There is no important question involved.

There is no conflict between the circuits, and no important federal or constitutional question involved in this matter. Also, the petitioners' new reliance on Lear, Inc. v. Adkins, 395 U.S. 653 (1969), involves a decision which they never discussed or even cited in the lower appellate court proceedings. The 1969 Lear decision, in brief, revoked the prior rule of licensee estoppel and authorized licensees to challenge the validity of the licensor's patents.

B. Petitioners' assertions that the patents are invalid or unenforceable due to WPCS's use of alternative pleadings under Rule 8 (e) (2) are factually and legally unsupportable.

Calco's petition asserts that WTC & WPCS allegedly admitted the invalidity of one or more of the patents-in-suit due to the alternative pleading of cross-claim Count VII against Aqua-Chem, and also allegedly due to WPCS's answer to Aqua-Chem's Interrogatory #2. Those assertions are unsupportable in both fact and law.

Exclusive licensee WPCS originally filed the Second Amended Complaint on August 31, 1982, which contained the cross-claim Count VII, against its licensor Aqua-Chem.* Count VII was filed

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*The same Count VII was contained in the Third Amended Complaint filed 7/22/83, Docket Sheet #77 (see two page Appendix herewith). Aqua-Chem at that time was still a co-plaintiff in the case, and the patents had been licensed from KSURF to Aqua-Chem and then exclusively sub-licensed again to WTC/WPCS.

under the established principle of Federal Civil Procedure Rule 8 (e) (2) that alternative and inconsistent pleadings are expressly permitted under the Federal rules. The general purpose of the Count VII* cross- claim against Aqua-Chem at that time was to guard against a possible eventuality (albeit doubtful) that some of the patents might be held invalid in the course of the litigation.

WTC/WPCS were in the unusual position of being an exclusive licensee under the patents from Aqua-Chem, and therefore, would not want to pay past or future royalties to Aqua-Chem if the patents were not upheld; and yet at the same time WTC and WPCS considered that their basic

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*While not of any major significance, it is noteworthy that the amended and more strict version of Rule 11, referred to in the Petition (p.4), did not become effective until August 1, 1983 which was after Count VII had been filed.

charge of the Complaint (Count I) charging validity and infringement of the four patents against Calco and Gartner was fully proper.

Calco et al and their counsel have repeatedly ignored and failed to appreciate that, at that time in 1982-83, no depositions had been taken at KSU or at Aqua-Chem; and; discovery concerning the patents was incomplete as to all parties concerned. Thus there was at that time a possibility (which never materialized) that later discovery/depositions at Aqua-Chem or at KSU might show some sort of prior public use or on sale bar, or possibly some other type of invalidating prior publications. That type of eventuality would not have been known to WTC/WPCS's counsel from any prior review of the U.S. Patent Office file wrapper histories or from prior art patent searches.

Contrary to the assertions made by Petitioners, the decision of Fisher v. Gillette Co., 505 F.Supp. 184 (N.D. Ill. 1981), supported WTC and WPCS in their pleading of the Count VII cross-claim, or at the very least a logical extension of the Fisher case was applicable. In the Fisher case, Hallmark Cards intervened as the exclusive licensee under Fisher's ball point pen patent. Hallmark set forth a position (virtually identical to WTC/WPCS) of alternative and inconsistent pleadings, whereby Hallmark stated that Fisher's patent was invalid, but also stated that it would be a co-plaintiff with Fisher against the infringer Gillette for patent infringement. A very basic point of the Fisher case was the court's view that neither Fisher nor Gillette could adequately represent the several interests sought to be protected by Hallmark, which

was "the very necessity for Hallmark's alternative inconsistent assertions". (505 F.Supp. at 186). A logical interpretation or extension of the Fisher decision clearly shows that the 1982-83 pleadings by WTC/WPCS were fully justified, particularly when recognizing that KSURF was an involuntary plaintiff at that time in the proceeding, and WTC/WPCS had to protect several interests on their own.

Petitioners also have argued that WTC and WPCS's answer to Interrogatory No. 2 from Aqua-Chem states an alleged admission that the two Hatch patents-in-suit No. 4,187,183 and No. 4,190,529 are invalid.* This is incorrect because Interrogatory answer No. 2 does not make an admission of

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*The two KSURF/Lambert & Fina patents 3,817,860 and 3,923,655 are not referred to in Interrogatory No. 2 and therefore are not affected by Petitioners' arguments in any event.

invalidity, it only identifies documents of prior art "...which in any manner refer or relate to the allegations in Count VII of the Third Amended Complaint". There is no admission or statement in answer No. 2 that the Hatch '183 and '529 patents are invalid.

In any event, the cross-claim Count VII referred to in Interrogatory 2, was settled between Aqua-Chem and WTC/WPCS in the month before the trial started, and was agreed to be dismissed with prejudice. (ref. District Court Docket Sheets, Doc. No. 143, filed 5/23/85 three weeks before trial). The dismissal of Count VII with prejudice was confirmed during the first day of trial by the District Court's entry of Judgment between Aqua-Chem and Water Tech/WPCS on June 13, 1985 (Document No. 158). Thus cross-claim Count VII was effectively ruled upon as not being proper and was dismissed.

While Petitioners have argued that the Interrogatory No. 2 answer was admitted into evidence, it is likewise true that the Settlement Agreement (PTX-5) between Aqua-Chem and Water Tech/WPCS, from the month before the trial, was also admitted into evidence. That Settlement Agreement (at Paragraph 5) clearly advised Petitioners that cross-claim Count VII was being dismissed with prejudice. In addition, Kansas State University Research Foundation (KSURF) was not a part of cross-claim Count VII* at any time, and therefore, KSURF is not bound by Count

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*Count VII was strictly an alternative pleading cross-claim between Water Tech/ WPCS and Aqua-Chem relating to their license contract dispute. KSURF also did not retain attorney M. Dinnin as its trial counsel until after Defendants had been notified that Count VII was agreed to be dismissed with prejudice. (ref. Notice of Settlement, Document 143, filed 5/23/85; and Notice re Counsel, Document 146, filed 5/31/85).

VII. We also do not feel compelled to agree with Petitioners' argument that Interrogatory No. 2 was admitted without objection, because WTC/WPCS did present to the District Court on the first day of trial a memorandum objecting to the use of alternative pleadings as judicial admissions (Doc. #156, 6/13/85). Also, by the District Court's judgment order of June 14, 1985 (Document #160), KSURF was substituted for Aqua-Chem with respect to the claim for patent infringement.

Even if the interrogatory No. 2 answer were construed as an admission, not conceded by WPCS/WTC, it should not be binding because it is contradicted by all the other evidence adduced at trial by plaintiff-Respondents. Freed v. Erie Lackawanna Railway Co., 445 F. 2d 619 (6th Cir. 1971), cert. denied, 404 U.S. 1017. For example as noted above, defendants

were advised prior to trial that Count VII referred to in the interrogatory was dismissed with prejudice. The settlement agreement (PTX-5) noting this was admitted to evidence at trial, and confirmed by the trial Court's judgment order of 6/13/85 (Docket Sheets, No. 158). Also, all of Respondent-plaintiffs' evidence referred to in the Pretrial Order and through its witnesses at trial, supported the full validity and infringement of all four patents-in-suit.

We now also direct attention to supporting cases which we believe indicate that usage of alternative inconsistent pleadings was fully proper in this case, and sanctioned by the Federal Rules (particularly where different defendants are involved in cross-claims or third party claims); and that such pleadings should not be taken as admissions.

Continental Insurance Company v. Sherman v. Coates & Dorsey, 439 F.2d 1294 (5th Cir. 1971). In this case, Sherman had obtained insurance for a boat through Continental Insurance Company's agent Coates & Dorsey. Sherman's boat was damaged and Continental refused to reimburse him, alleging that it had not been informed of the boat's intended commercial usage. Sherman alleged he had advised Coates of the intended use, and sued both Coates for negligently causing issuance of the policy without proper coverage, and Continental for recovery under the policy.

In answering Sherman's claims, Coates alleged that Sherman had failed to disclose the boat's intended uses. Then in a cross-claim against Continental, Coates alleged that Sherman had fully informed Coates of the intended use, and

that all those facts were in turn communicated to Continental by Coates, such that Continental was obligated to indemnify Coates against any judgment. Thus, we have a situation where Coates' pleadings were clearly inconsistent and one hundred eighty degrees opposed.

The Fifth Judicial Circuit held that this type inconsistent pleading was liberally permitted under the provisions of Rule 8 (e) (2) and could not be used as a judicial admission, because to do so would negate the other alternative pleading in the case. Continental supra, 439 F.2d at 1298:

> "Thus, as a necessary exception to the general rule, there is ample authority that one of two inconsistent pleas cannot be used as evidence in the trial of the other."

Contrary to what has been argued by Petitioners, WTC/WPCS did object to the use of the alternative pleading Count VII

as a judicial admission at the trial. (See Plaintiff's Memorandum of Law -- Alternative Pleadings do not lead to Judicial Admissions" presented to and filed with the trial court on the first day of trial, 6/13/85, document No. 156; Tr. 115).

Just as in the Continental v. Sherman case, WTC/WPCS were permitted under the rules to plead possible invalidity of the patents, in their contract dispute with Aqua-Chem, to guard against the possible but unlikely eventuality that Aqua-Chem's patents might be invalid. However, that 1983 pleading (made before any depositions were taken) was later withdrawn and dismissed with prejudice. (See Docket Sheets, Document No. 143 filed 5/23/85 and No. 158 of 6/13/85).

The Seventh Circuit decision of Douglas Equipment, Inc. v. Mack Trucks et

al, 471 F.2d 222 (7th Cir. 1972) is also fully supportive of Respondent-plaintiffs' position. In that case, Douglas sued Mack for personal injuries suffered by its driver on a truck built by Mack Truck Company, wherein the air tank on the truck underwent a horrendous explosion. Mack had answered the Douglas complaint with a statement that the truck was not defective. In its third party cross-claim against Cutler Products Company, who had supplied the air tank to Mack, Mack had stated that the tank was "unreasonably dangerous". The decision indicates that the trial court was justified in treating this as an alternative pleading, rather than as an admission; and that interrogatories related to same should not be taken as an admission. The Douglas rationale was that the pleadings were obviously conditioned on the hypothetical

establishment of Mack's liability to Douglas, which was not conceded by Mack. "Therefore, he is not admitting anything other than his uncertainty". (471 F.2d at 224). Just as in the present case, WTC/WPCS had some uncertainty in 1982-83 (before any depositions were taken), concerning the Aqua-Chem patents in their license dispute with Aqua-Chem. Thus, Count VII and Interrogatory No. 2 related to same should not be taken as an admission against WTC/WPCS, or KSURF who was not even involved with the withdrawn Count VII or the interrogatory answer concerning same.

In 1983, due to uncertainties involved and because KSURF was still an involuntary Plaintiff, WTC/WPCS had reason to seek to protect their several interests. One of those interests was the defensive pleading of cross-claim Count

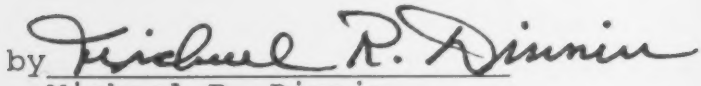
VII against Aqua-Chem on the uncertainties of the license contract dispute with them. However the Petitioner-defendants were advised prior to trial that Count VII was withdrawn, and defendants had always been advised from the initial filing of the lawsuit that they were charged with the validity and infringement of all four patents-in-suit.

Accordingly, there was no error in the trial court's finding No. 73 on this matter (658 F.Supp. at 972-73), nor was there any error in the Federal Circuit's affirmance of the trial court on this matter (see Petitioners' Appendix, pages 20-25).

RELIEF REQUESTED

Respondents request that the Court deny Petitioners' writ for certiorari.

Respectfully submitted,

by 

Michael R. Dinnin
(Counsel of Record)
Robert A. Dunn
HARNESS, DICKEY & PIERCE
1500 N. Woodward Ave.
Birmingham, Michigan 48011
(313) 642-7000
Attorneys for Respondents

38. WPCS and WTC hereby request a ruling, and a judgment, that the litigation expenses undertaken by them in connection with the prosecution of this civil action (including their attorney fees and costs) and any damages (or recovery) received from the defendants in this action, can be set-off against royalties due to AQUA-CHEM. This remedy should be particularly applicable in that AQUA-CHEM and their attorneys have refused to cooperate or assist in any way to prosecute or prevent the infringing acts carried out by the defendants.

THIRD AMENDED COMPLAINT → COUNT VII CROSS-CLAIM BY WPCS AGAINST LICENSOR AQUA-CHEM THAT AQUA-CHEM'S PATENTS ARE INVALID

FILED 7-22-83

Doc. #77

39. WPCS and WTC hereby claim that the licensor AQUA-CHEM's patents enumerated and referred to hereinabove are invalid because they are anticipated or rendered obvious by the prior art (See 35 U.S.C. §§102, 103), and a declaratory judgment concerning said patents is requested from the Court.

40. Jurisdiction and venue for this count are founded under the U.S. patent laws, Title 35, U.S. Code, and under 28 U.S.C. §§1338, 1391, 2201 and 2202.

WHEREFORE, the prayer for relief is that:

(a) U.S. Letters Patents No. 4,190,529, No. 4,187,183, No. 3,923,665 and No. 3,817,860 be adjudged as to whether the patents are valid or invalid.

(b) If valid, defendants CALCO, GARTNER, and KALNITZ be adjudged and decreed to have infringed Patents No. 4,190,529,

Appendix A

No. 4,187,183, No. 3,923,665 and No. 3,817,860; and, to have engaged in unfair competition.

(c) If the patents are adjudged to be valid, a preliminary and permanent injunction issue restraining and enjoining each defendant, and any of their related employees, officers, agents, attorneys, and those acting in privity or concert with them, and each of them, from further infringements and/or unfair competition.

(d) Defendants individually and jointly, be ordered to account for and pay to plaintiffs treble damages by reason of their infringements and their unfair competition.

(e) This be decreed an exceptional case within the meaning of 35 U.S.C. §285 and reasonable attorney fees be awarded to plaintiffs from the defendants, and that costs be similarly awarded.

(f) Plaintiffs WTC and WPCS be granted such other and further relief and damages as may be proper under the circumstances.

By Michael R. Dinnin

W. A. Van Santen, Esq.
WOOD, DALTON, PHILLIPS, MASON & ROWE
20 N. Wacker Drive
Chicago, Illinois 60606
(312) 346-1630

Michael R. Dinnin, Esq.
HARNESS, DICKEY & PIERCE
1500 North Woodward Avenue
Birmingham, Michigan 48011
(313) 642-7000

Attorneys for the Plaintiffs
WTC and WPCS

RECEIVED
JUL 25 1983
WALLENSTEIN, WAGNER, HATTIS, STRAMPEL & AUBEL, LTD.

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing pleading entitled:

BRIEF FOR RESPONDENTS IN OPPOSITION
- AND APPENDIX -

has been served on Petitioners' counsel:

Robert E. Wagner, Esq.
Wallenstein, Wagner, Hattis,
Strampel & Aubel Ltd.
100 South Wacker Drive
Chicago, Illinois 60606

by forwarding same to the above, first class U.S. mail, postage pre-paid,

this 28th day of OCT., 1985.

By Michael R. Dinnin

Michael R. Dinnin, Esq. (P-12801)
HARNESS, DICKEY & PIERCE
1500 North Woodward Avenue
Birmingham, Michigan 48011
(313) 642-7000

Ref. No.: 2398-40001